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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. —

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

JULIA BUTTERWORTH, HENRY W. BUTTERWORTH, and Girard Trust Company, Trustees Under the Will of William B. Butterworth, Deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of David Burnet, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in the above cause on March 3, 1933, reversing a decision of the Board of Tax Appeals (R. 45).

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 16–29) is reported in 23 B.T.A. 838. The opinion of the Circuit Court of Appeals (R. 39–44) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 3, 1933 (R. 45). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a testamentary trustee is entitled to claim as a deduction, in computing the net income of the trust, amounts which are distributed to the testator's widow, who elected to take an interest in the trust created by the will in lieu of her dower and statutory interests in the decedent's estate.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 8–9.

STATEMENT

The facts found by the Board of Tax Appeals (R. 17–18) may be summarized as follows:

William B. Butterworth died a resident of Pennsylvania on October 5, 1921. By his will he disposed of certain personal belongings and left the residue of his estate to the respondents as trustees, with directions to pay over the entire net income from the property to his widow during her natural life. Provision was made for the disposition of the corpus of the estate after her death.

During 1924 and 1925 (the years here involved) the trustees paid the income to the widow pursuant

to the terms of the will. The amount thus distributed, together with amounts distributed to the widow in prior years, did not equal in the aggregate the value of the interest to which the widow would have been entitled had she elected to take against the will.

In computing the taxable income of the estate for the years involved the respondents deducted from gross income the amounts distributed to the widow. The Commissioner disallowed the deduction thus claimed and asserted deficiencies accordingly. The Board of Tax Appeals approved the Commissioner's action. The court below, with one judge dissenting, reversed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in holding that the distributions were of income *qua* income and that the widow was with respect to these distributions a true beneficiary.

2. The Circuit Court of Appeals erred in holding that income, distributed by testamentary trustees to a widow who has elected to take under the will, is deductible by the trustees although it is not taxable to the widow, thus creating an exemption not contemplated by the revenue statutes.

3. The Circuit Court of Appeals erred in deciding that the amounts distributed by respondents to the widow in pursuance of the terms of the testamentary trust were deductible by the trustees.

4. The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Circuit Court of Appeals in this and the three companion cases filed with this petition are in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Atkins* v. *Commissioner*, 63 F. (2d) 88. In that case a trustee was denied deductions for annual sums paid to a widow who had renounced her dower rights, and the decision was based upon the premise that the widow was a purchaser rather than a true beneficiary.

In *Warner* v. *Walsh*, 15 F. (2d) 367 (C.C.A. 2d), *United States* v. *Bolster*, 26 F. (2d) 760 (C.C.A. 1st), and *Allen* v. *Brandeis*, 29 F. (2d) 363 (C.C.A. 8th), it was held that payments to a widow from her deceased husband's estate, accepted by her in lieu of her dower or statutory rights in his estate, represent return of capital and not taxable income to the recipient. The court below apparently accepted the doctrine of these cases, and thus in effect held that neither the trustee nor the widow is liable for a tax in cases of this character, a conclusion which seems contrary to the clear purpose of the statutes to tax the income either to the trustee or to the beneficiary. Cf. *Eisner* v. *Macomber*, 252 U.S. 189, 203; *Irwin* v. *Gavit*, 268 U.S. 161, 166; *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, 235.

2. The decision of the Circuit Court of Appeals is erroneous if the decisions in the three Circuit

Court of Appeals cases just cited are correct. The Revenue Acts have been drafted with a view to taxing all income not expressly exempted. Estates and trusts are productive of taxable income and have been specifically included for tax purposes in the various revenue statutes since the adoption of the Sixteenth Amendment. The statutes disclose a consistent legislative intent to tax either the trustee or the beneficiary upon all taxable income distributed.[1]

In the three Circuit Court decisions of *Warner* v. *Walsh*, *United States* v. *Bolster*, and *Allen* v. *Brandeis*, *supra*, the Government sought to sustain the imposition of the tax as against the widow who had received the distributions. The courts held that this could not be done for the reason that the widow was in reality the purchaser of a capital asset and the distributions were nontaxable returns of capital, at least until the value of her statutory interest was recovered. The Treasury Department reluctantly accepted the principle announced by these cases and published rulings to the effect that such payments were nontaxable returns of capital up to the value of the property released, that the widow was thereafter to be "treated as any other income beneficiary," and that only then would the

[1] This has been repeatedly recognized in the decisions. *United States* v. *Bolster*, 26 F. (2d) 760, 763 (C.C.A. 1st); *Atkins* v. *Commissioner*, 63 F. (2d) 88, 89 (C.C.A. 1st); *Title Guarantee L. & T. Co.* v. *Commissioner*, 63 F. (2d) 621 (C.C.A. 5th); *Commissioner* v. *Freuler*, 62 F. (2d) 733, 734 (C.C.A. 9th).

fiduciary be permitted to deduct the payments made in computing the net income of the trust. I.T. 2506, VIII-2 Cumulative Bulletin 129; I.T. 2480, VIII-2 Cumulative Bulletin 141.

Although we know of no decisions by Federal courts contrary to the three Circuit Court of Appeals decisions cited above, we call attention to the decision of the Court of Appeals of New York in *People ex rel. Kight* v. *Lynch*, 255 N.Y. 323, 326, 327, which declined to apply the principle announced by the Federal courts to the construction of provisions of a State income-tax statute substantially similar in terms to the Revenue Act of 1918.

The decision of the court below, accepting as it does the doctrine of the cases above cited, nevertheless permits a deduction to the trustee. The decision seems to be rested upon the assumption that the statute has missed, to some degree, its declared purpose. Thus the court holds the income to be exempt although there is no language in the statute to indicate that an exemption was intended. Nothing is to be taken in favor of a claim of exemption by inference or implication. *Bank* v. *Tennessee*, 104 U.S. 493, 495; *Bank of Commerce* v. *Tennessee*, 161 U.S. 134, 146; *Cornell* v. *Coyne*, 192 U.S. 418, 431. *Heiner* v. *Colonial Trust Co.*, *supra*, p. 235.

3. The question is one of considerable importance in the administration of the revenue laws. It is one which arises under all of the taxing Acts. The Bureau of Internal Revenue informs us that there are now pending a large number of cases, involving

approximately one and one-quarter million dollars in taxes, the disposition of which depends upon the correct answer to this question. Furthermore, the Treasury Department is placed in a position which renders the proper administration of the revenue laws in cases of this character virtually impossible. The Government originally adopted the view that the distributions were taxable to the widows receiving them. This view was abandoned in deference to the authority of the three Circuit Court of Appeals decisions in *Warner* v. *Walsh*, *United States* v. *Bolster*, and *Allen* v. *Brandeis*, which were believed to settle the question. If the reasoning of the Third Circuit Court of Appeals in this and associated cases is correct, the income is apparently exempt as to both trust and distributee. If the views of the Fifth Circuit Court of Appeals [1] are correct, the widow is the proper taxpayer, and the three Circuit Court cases above cited are wrong. Until this confusion is resolved by a decision of this Court, the Treasury is unable to make satisfactory and equitable disposition of the many cases raising one aspect or the other of this problem.

Wherefore, it is respectfully submitted that this petition should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

MAY 1933.

[1] *Title Guarantee L. & T. Co.* v. *Commissioner*, 63 F. (2d) 621, pending on petition for certiorari, No. —, October Term, 1932.

APPENDIX

STATUTES INVOLVED

Revenue Act of 1924, c. 234, 43 Stat. 253, 275:

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed

as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year (U.S.C., Title 26, Sec. 960).

Section 219 (a) and (b) (2) (U.S.C.App., Title 26, Sec. 960) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 32, is identical with the corresponding provisions of the Revenue Act of 1924.

Purdon's Pennsylvania Statutes Annotated, Title 20, Decedents' and Trust Estates:

SEC. 31. *Widow's share in lieu of dower.*—The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law, so far as relates to land of which the husband died seised. * * * aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in lands of which the husband died seised. * * * (1917, June 7, P.L. 429, § 3.)

SEC. 261. *Spouse can elect to take against will.*—When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: * * * (1917, June 7, P.L. 403, § 23 [a].)

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